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CITY OF
San Bernardino

OFFICE OF THE CITY ADMINISTRATOR
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Federal Communications Commission
Notice of Inquiry
Promotion of Competitive Networks in Local Telecommunications
WT Docket No. 99-217
CC Docket No. 96-98

Mr. Fred Wilson, City Administrator
City of San Bernardino
300 North "D" Street
San Bernardino, CA 92418
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Comments of the City of San Bernardino

This is in response to your request for comments regarding our experiences with municipal management of the public right of way and taxation of telecommunication activities. The City of San Bernardino is unaware of any specific complaints in either of these areas. For this reason, and the reasons below, we urge the FCC to *decline* to exercise whatever authority it may have to try to address any isolated or contrived problems. [Note: The City of San Bernardino also endorses the position of NATOA and the other local government organizations in their comments on this docket.]

First, federal law already establishes significant limitations on municipalities in the area of right of way management, regulation, and taxation of telecommunication companies. In fact, the FCC has cited in this proceeding several instances where municipalities have exceeded their regulatory authority under existing federal law, and the aggrieved telecommunication companies have been able to successfully protect their interests under that law.

Second, California municipalities have long exercised the traditional role of protecting and overseeing the use of the public right of way. This role is not an overly intrusive one, but is consistent with the California Supreme Court's holdings that specifically identified and circumscribed the cities' areas of oversight. *Pacific Tel.&Tel.Co. v. City and County of San*

Francisco (1959) 51 Cal.2d 766, 336 P.2d 514, 519. Although California cities do not possess extensive regulatory authority over the public right of way, they do carry the considerable burden of maintaining and protecting this finite public asset. Accordingly, a substantial part of this City's budget is devoted to street improvement and road repair and undergrounding of utility facilities. Under California law, wired telecommunication companies are exempt from local franchise fees, which would otherwise help defray such costs. **Public Utilities Code §7902.** Thus, local government (i.e., the public) and other utilities are left with the burden of maintaining the public right of way, while the 500 or more licensed telephone companies in California with wired facilities do not share in such essential maintenance costs of the public property. The notion that telecommunication companies need further protection in this area is without merit.

With respect to taxation, many California municipalities (over 160) impose an excise tax on the use of utility services, including telecommunications. This tax, like all taxes in California, is subject to equal protection constraints (federal and state), election requirements for tax increases, and other legal restrictions (including the federal **Telecommunications Act of 1996**, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (1996 Act)). California cities and counties have been relying on utility excise taxes for over 30 years in providing essential municipal services such as police, fire, street and sewer maintenance, and public libraries. Unfortunately, we have seen attempts at the federal level to grant exemptions for certain utility technologies, *e.g.*, direct broadcast satellite. Such special interest exemptions, in the guise of encouraging competition, inevitably produce inequities and anti-competitive impacts. We urge the FCC to resist the urgings of special interest groups to intervene here. Instead please let these groups rely on their considerable existing federal and state statutory and constitutional protections to address their alleged grievances, and not federal administrative fiat.

Finally, it is worthy to note that when the telecommunications industry does raise legitimate concerns over taxation or right of way management issues, California cities have been able to address those matters through cooperation. For example, this City, together with other California cities, have adopted administrative rules to address concerns raised by certain telecommunication companies in connection with the cities' utility users taxes. We are currently in the process of engaging in similar cooperative meetings with the wireless industry to address tax application issues. Again, we strongly prefer to develop our own consensus-based solutions in the unique factual context of California, rather than the political milieu of Washington D.C. Thank you for your consideration of these comments.

Sincerely,



FRED WILSON

City Administrator

FAW/md